No. 84-627 (5)

In The

Supreme Court of the United States

October Term, 1984

THE CITY COUNCIL OF THE CITY OF CHICAGO,
Petitioner,

v.

MARS KETCHUM, et al.,
Respondents,

and

CHARMAINE VELASCO, et al.,
Respondents,

and

POLITICAL ACTION CONFERENCE OF ILLINOIS, et al.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF PETITIONER CITY COUNCIL OF THE CITY OF CHICAGO

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REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF PETITIONER CITY COUNCIL OF THE CITY OF CHICAGO

I.

PETITIONER CITY COUNCIL HAS CAPACITY UNDER ILLINOIS LAW TO FILE THIS PETITION.

The two briefs filed in opposition raise an issue which returns one to the bromide that if you are weak on the law and the facts, pound the lawyer, his client or the trial judge. They would seemingly do anything to foreclose review of the Seventh Circuit's decision.

The Corporation Counsel of the City of Chicago in his brief in opposition contends that the City Council lacks capacity to file its petition herein and, more specifically, that "Mr. Harte has no power to pursue this petition on the 'City Council's' behalf, ..." (Corp. Csl. Br., p. 14) This same contention was raised by the Corporation Counsel before the Seventh Circuit upon the filing of a petition for rehearing following the Seventh Circuit's original Opinion being rendered on May 17, 1984, an Opinion which was subsequently withdrawn. The ethical implications arising from this contention prompted Mr. Harte to engage counsel and present papers on his behalf at that level. The required brevity of this reply does not allow for a full recitation of the relevant facts concerning the Corporation Counsel's contention. Therefore, included with this reply brief is a Supplemental Appendix which contains the following pertinent filings before the Seventh Circuit with regard to this matter: (1) the Corporation Counsel's motion to strike the petition for rehearing (S. App. 1-5); (2) the response of the City Council and Attorney William J. Harte to the motion to strike (S. App. 6-56); and (3) the reply of the Corporation Counsel (S. App. 57-60). The Seventh Circuit's order denying the motion to strike on the ground that it was moot can be found within the Seventh Circuit's order denying the petition for rehearing. (App. 162). Petitioner and its counsel would urge this Court to review the foregoing filings before the Seventh Circuit

for a full recitation of the facts and the law on this particular issue.

Briefly stated, the general authority of the Corporation Counsel to represent the City does not include the right to take action in connection with any particular litigation contrary to the express desire of the City Council. In *O'Neill v. City of Chicago*, 169 Ill. App. 546 (1912), for example, it was held that the release and waiver of an appeal by the Corporation Counsel was without lawful effect where the Corporation Counsel was directed by the City Council to pursue the appeal. Similarly, in *Hotchkiss v. Calumet City*, 377 Ill. 615, 37 N.E.2d 332 (1941), the Illinois Supreme Court held that the authority to prosecute or abandon an appeal rests with the City Council. Likewise, in *People ex rel. Altorfer v. City of Peoria*, 378 Ill. 572, 39 N.E.2d 42, 44 (1942), the Illinois Supreme Court held that, since the attorney who had been representing the City did not follow the City Council's direction to dismiss the appeal, "the City Council found it necessary to employ other special counsel for this purpose. Defendants' motion to dismiss the appeal, filed by attorney Rauch [the new special counsel], must be allowed, and the motion of their former special counsel to strike the motion filed by attorney Rauch is denied."

Regardless of the Corporation Counsel's general authority to represent the City, clearly no such authority exists contrary to the will of a majority of the City Council. Neither the Corporation Counsel nor the Mayor has the authority to interfere with the attorney-client relationship existing between the City Council and its attorney, William J. Harte, and neither has the authority to direct that further appeals be abandoned. *See, e.g., West v. Bank of Commerce and Trust, et al.*, 167 F.2d 664, 666 (4th Cir. 1948) ("[t]he ordinary rule is that an attorney at law has no authority, without his client's permission, to compromise his client's claim and this rule seems to apply to attorneys for mu-

nicipalities as well as to attorneys for private individuals [citations omitted]").

Finally, it goes without saying that the authority of the Corporation Counsel does not include the authority to represent conflicting interests in the same litigation, and where such a conflict exists between the Mayor and the views of a majority of the City Council, the appropriate course of action is for the City Council to retain independent counsel.* In the instant case, not only does a conflict exist, but the City Council is the party defendant in this litigation. It has a right to be represented by an attorney who will follow its directions. It could not be clearer that the Corporation Counsel in this case has no intention of doing so.

II.

THE DISTRICT COURT PROPERLY INTERPRETED SECTION 2 OF THE VOTING RIGHTS ACT, AS AMENDED, AND GRANTED AN APPROPRIATE REMEDY.

The Respondents and the Corporation Counsel expend a substantial part of their briefs seeking to discredit certain of the district court's interpretations, particularly those relating to alleged constitutional violations and statutory interpretations. Petitioner states unequivocally that this attack on the district court and its findings is at times unfair, inaccurate, misleading, and grossly distorted, but more importantly, it is unwarranted and irrelevant to the issues raised by the Petitioner in its petition for writ of certiorari, *i.e.*, issues concerning whether

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* See *Kay v. Board of Higher Education of the City of New York*, 20 N.Y.Supp.2d 898 (1940); *Krahmer v. McClafferty*, Del. Super., 282 A.2d 631 (1971); *City of Tukwila v. Todd*, 17 Wash. App. 401, 563 P.2d 223 (1977); *Guzzetta v. Carey*, 166 N.Y.Supp. 2d 434 (1957); *Judson v. City of Niagara Falls*, 124 N.Y.Supp. 282 (1910).

the *relief* determined by the district court is fair and equitable and fulfills all the statutory and constitutional criteria. And frankly, the conduct of the Respondents and the Corporation Counsel raises cause in itself supporting this Court's acceptance of this case for review. From the inception of these proceedings, the focus of this case should have been on the "results" of the plan adopted by the City Council in its totality under Section 2 and the adoption of an appropriate remedy if those results violated the Act. As noted continuously throughout the litigation by the district court and defense counsel, the amendment was designed to eliminate precisely what occurred in this case, *i.e.*, weeks of testimony from the plaintiffs seeking to establish intentional and purposeful discrimination, which led to weeks of testimony from defendants seeking to refute such conclusions. A major portion of the briefs in opposition revisit that long, tired travail for no reason other than to seek to obtain some possible advantage in reciting conclusions *not* accepted by the district court from *sharply contested issues*.

With the page limitation for this brief, Petitioner cannot afford the temptation to respond to these statements because the Seventh Circuit *agreed* with the district court's determination that there was, indeed, a Section 2 violation in the Council Plan.

III.

THE SEVENTH CIRCUIT ERRONEOUSLY REVERSED THE DISTRICT COURT'S REDISTRICTING PLAN FOR THE CITY OF CHICAGO.

The Seventh Circuit remanded this matter to the district court to consider establishing at least 19 wards with an "effective" black majority and 4 wards with an "effective" majority of Hispanics. The district court's approved plan creates 19 wards with more than a 50% black voting age majority and 4 wards with more than a 50%

Hispanic voting age majority. Understandably, the Respondents and the Corporation Counsel attempt to "gloss over" the Seventh Circuit's "fine-tuning" of the district court's plan.* These attempts fail.

In an attempt to detour this Court from the issues before it as presented by the Seventh Circuit's decision, Respondents and the Corporation Counsel assail the district court for alleged inadequate findings of fact and an alleged misinterpretation of Section 2 of the Voting Rights Act. The immediate and dispositive response to these extended contentions is that the Seventh Circuit did not even address the sufficiency of the district court's findings of fact and conclusions of law under Rule 52(a), expressly stating, "In light of our holding on this appeal, it is not necessary to address this issue." (App. 7, n. 3).** Contrary to the contentions of the Respondents and the Corporation Counsel, the Seventh Circuit did not remand

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* Both the Respondents and the Corporation Counsel ignore the Seventh Circuit's expressed approval of 19 black wards and 4 Hispanic wards being an adequate remedy in this case. (App. 38-39). Indeed, the Respondents and the Corporation Counsel claim that absent alleged illegal fracturing, blacks would constitute majorities in excess of 70% in 15 to 16 wards on the South Side and 5 to 6 wards on the West Side, for a total of 20 to 22 black wards, or 40 to 44% of the City's wards, as contrasted with blacks constituting 35.5% of the voting age population in the City. (Resp. Br., pp. 5, 9; Corp. Csl. Br., p. 4, n.3). However, the Respondents' own expert, Professor Hauser, criticized Respondents' Alternatives 2 and 3 (21 and 22 black wards, respectively) as resulting in a discriminatory impact on the white population. (Hauser, Tr. 795, 816, 845, 849, 857). The true intent of the Respondents and the Corporation Counsel to maximize minority representation and their intent to continue to do so in any further proceedings herein, regardless of the Seventh Circuit's decision, simply cannot be denied.

** Before the Seventh Circuit, Petitioner contended that this issue should not be a subject of review since relief was not requested by the Respondents on this issue pursuant to Fed. R. App. P. 28(a)(2).

this case because "it had no choice" given the district court's alleged inadequacies. Rather, the Seventh Circuit remanded this case because it held that the district court abused its discretion in rejecting the alleged "widely accepted understanding . . . that minorities must have something more than a mere majority even of voting age population in order to have a reasonable opportunity to elect a representative of their choice", *i.e.*, that minorities must constitute 65% of total population or 60% of voting age population or some variation of these guidelines in order to have a "reasonable" opportunity.* (App. 29, 40-41).

The Corporation Counsel claims that the district court concluded that 50% voting age majorities would *presumptively* remedy all violations of the Act. (Corp. Csl. Br., p. 20). That statement is simply untrue. The district court expressly found on the Record before him that there was "no statistical or objective evidence in the record that a minority is entitled to or should have more than a majority of the voting age population in order to have a reasonably fair opportunity to . . . elect candidates of their choice" and, further, that the "figures which . . . one of the defendants' expert witnesses put into the record were quite revealing and satisfies me that when the opportunity arises or when the incentive is presented, it is not necessary for a minority to have more than 50 percent [voting age population] to control a ward." (App. 63-64). Further, the Corporation Counsel announces a new "but for" test to be applied under Section 2. (Corp. Csl. Br.,

* The reversal of the district court's remedy by the Seventh Circuit's Amended Opinion is better understood when viewed in conjunction with the fact that the Seventh Circuit's original Opinion implemented the so-called "65% guideline" as a legal standard, *unless persuasively rejected by the evidence.* That opinion was withdrawn after the filing of the petition for rehearing.

p. 20). The test is what the test is, *i.e.*, whether the political processes leading to nomination or election are equally open to participation by members of the protected class or, in other words, does the redistricting plan fully provide an equal opportunity for minority citizens to participate and to elect candidates of their choice?*

Neither the Respondents nor the Corporation Counsel attempt to explain to this Court why the respective minorities do not have an equal opportunity to participate in the wards in question. Neither the Respondents nor the Corporation Counsel can explain to this Court why blacks in the 37th Ward, for example, with 56.2% voting age population, as contrasted with a 30.0% white voting age population, do not have the equal opportunity contemplated under Section 2 or, to use the Seventh Circuit's phraseology, do not constitute an "effective" majority. The fact is that it is an effective majority.

Both the Respondents and the Corporation Counsel suggest that the black population levels in the 15th and 37th Wards must be restored to their pre-redistricting levels. The Seventh Circuit itself rejected such a restoration requirement, stating "there is no vested right of a minority group to a majority of a particular magnitude unrelated to the provision of a reasonable opportunity to elect a representative under well-recognized principles." (App. 40).

The Respondents' attempt to limit the applicability of the *Zimmer-White* factors to the issue of liability is simply

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* The Corporation Counsel apparently concedes that the minority group would have "an even 50/50 chance to win" where they constitute an even 50% voting age population against a 50% white voting age population. (Corp. Csl. Br., p. 21). It is difficult to understand then why the minority groups do not have *more than* an equal opportunity in the wards in question where the protected minority group voting age population exceeds the white voting age population by at least 8.9% (Ward 26) and by as much as 43.3% (Ward 7). (*See* Petition, p. 24).

wrong. (Resp. Br., pp. 24-25). Liability and remedy under Section 2 are necessarily "two sides of the same coin." If the district court's remedy is inadequate, which it is not, it is because it still violates Section 2 of the Voting Rights Act. To equate the remedy necessary under Section 2 in the City of Chicago and in the State of Illinois, *where more black candidates have been elected to public office than in any other state or large metropolitan center in the country* (Guterbock, Tr. 2491; Preston, Tr. 1652), with the remedy necessary under Section 2 in the State of Mississippi, for example, contravenes the expressed statutory "totality of circumstances" standard and, more specifically, the *Zimmer-White* factors. While the Seventh Circuit pays "lip-service" to the *Zimmer-White* factors, it ultimately relies upon decisions from the southern states to structure the appropriate remedy herein, *i.e.*, the 65% guideline or some statistically-supported variation thereof.

Respondents concede that voting age statistics reflect the actual voting strength of the minority group. (Resp. Br., p. 27). Blacks comprise 35.5% of the City's total voting age population and under the district court's plan constitute a majority voting age population in 19 wards and a plurality in one ward, for a total of 20 wards or 40% of the City's wards. The *overrepresentation* assured by the district court's plan must, by definition, *afford the black community of Chicago representation reasonably equivalent to their political strength.*

With respect to the Hispanics, Respondents cannot supply this Court with *any* legal justification for supplanting the Hispanic wards with an "appropriate corrective" for "non-citizenship" of Hispanics, and the Corporation Counsel does not even attempt to justify such a procedure.*

* There is absolutely nothing in the Record which indicates to what extent the 14.0% Hispanic total population (11.7% voting age population) in the City of Chicago consists of *non-citizens.*

It is impossible to provide Hispanics with proportional representation given their wide dispersal within the white community. Only 27.9% of the Hispanic population of the City of Chicago live in precincts comprised of 70-100% Hispanic population and only 43.1% live in precincts comprised of 60-100% Hispanic population* (Def. Ex. 134). Suffice it to say that with respect to the Northwest Side Hispanic wards, the Hispanic Respondents essentially achieved the results they sought, and that with respect to the two Southwest Side Hispanic wards, the Hispanic population is in excess of 65% total population in each. The opportunity is there.

The concern herein is to assure the particular minority groups an equal opportunity to participate in the electoral process in the wards in question. The district court determined, *based upon the Record before it*, that the appropriate "corrective" was 50% voting age population. The district court expressly rejected the 65% guideline based upon the Record. (App. 63-64). The Seventh Circuit rejects that finding, *not upon the "clearly erroneous" standard*, but rather upon what it perceives should be the standard based upon *national* census figures, the purported historical position of the Justice Department, the purported expert opinion, and the purported history of redistricting jurisprudence.

Respondents and the Corporation Counsel can re-reargue the evidence and testimony of the Record and attack the reliability of the Petitioner's data base, but in the end they must return to the fact that the district court made certain findings based upon an extensive Record and those findings stand unless the court of review determines them to be "clearly erroneous." The Seventh Circuit did not

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* These figures are in stark contrast to the 92-5% of the Black population of the City of Chicago which live in precincts of 60-100% Black population. (Def. Ex. 135).

find them to be "clearly erroneous," nor did it state that it could justifiably ignore those findings. Rather, the Seventh Circuit found the district court's remedy to be an abuse of discretion herein based upon what remedies have been structured in other places, at other times, for other reasons.

Finally, the Seventh Circuit's decision is not inappropriate for review as contended by Respondents. (Resp. Br., pp. 27-30). This area of increasing federal jurisprudence and the proper application of Section 2 of the Voting Rights Act, as amended, thereto requires some direction from this Court to the district courts engaged in this "political thicket." R. Stern & E. Gressman, *Supreme Court Practice* 299-302 (5th ed. 1978).

CONCLUSION

For the reasons given, this Court should accept this cause for review.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 83-2044, 83-2065, 83-2126 Consolidated

MARS KETCHUM, et al.,
Plaintiffs-Appellants,

and

CHARMAINE VELASCO, et al.,
Plaintiffs-Appellants,

and

POLITICAL ACTION CONFERENCE OF ILLINOIS, et al.,
Plaintiffs-Appellants,

and

STANLEY PILLMAN, et al.,
Plaintiffs-Intervenors,

and

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,

vs.

JANE M. BYRNE, et al.,
Defendants,

and

THE CITY COUNCIL OF THE CITY OF CHICAGO,
Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 82 C 4085, 82 C 4431, 82 C 4820, Consolidated.
The Honorable **Thomas R. McMillen**, Judge Presiding.

MOTION TO STRIKE PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

NOW COMES the CITY COUNCIL of the City of Chicago, defendant-appellee, by its attorney, JAMES D. MONTGOMERY, Corporation Counsel of the City of Chicago, and moves this honorable court for entry of an order striking the Petition for Rehearing, With Suggestion For Rehearing En Banc, filed on June 7, 1984, in the above-captioned cause. In support of this motion, defendant-appellee states as follows:

STATEMENT OF FACTS

On May 17, 1984, this court entered its decision in this litigation finding that the City Council of the City of Chicago had violated the Voting Rights Act in its 1981 redistricting of the city's wards. This court remanded this case to the district court for the purpose of drawing a ward map that meets the requirements of the Voting Rights Act.

By letter dated June 6, 1984 (Appendix A [*See* S.App. 28-29]), the Corporation Counsel of the City of Chicago notified WILLIAM HARTE, counsel for the defendant-appellee City Council of the City of Chicago, that his authority to represent the City Council in this litigation was immediately terminated and that the Corporation Counsel had exercised his statutory duty to represent the City Council. The letter terminating the employment of William Harte as counsel for the City Council was personally served on Mr. Harte. On June 7, 1984, the Corporation Counsel filed his appearance as attorney for the City Council with this Court.

Despite receipt of the letter terminating his employment, Mr. Harte, purportedly acting as counsel for the City Council, filed on June 7, 1984, a Petition for Rehearing, With Suggestion For Rehearing En Banc in this case. This Petition was not authorized by the Corporation Coun-

sel. In a footnote in the Petition (Petition, p. 1), counsel indicated that he was instructed by a majority of the aldermen of the City Council ". . . to take all action necessary to appeal the decision in this case."

ARGUMENT

The duties, power, and authority of the Corporation Counsel are established by statute and ordinance. Creation of the Office of Corporation Counsel is authorized by the Illinois Municipal Code, section 3-7-1, Ill. Rev. Stat. 1983, ch. 24, par. 3-7-1. A description of the duties and powers of the Office of Corporation Counsel is found in Ill. Rev. Stat. 1983, ch. 24, par. 21-11. This section reads as follows:

> "The head of the law department of the city shall be the corporation counsel. The corporation counsel shall be and act as the legal advisor of the city council and the several officers, boards and departments of the city. He shall appear for and protect the rights and interests of the city in all actions, suits, and proceedings brought by or against it or any city officer, board or department, including actions for damage when brought against such officer in his official capacity; provided, however, that when an officer or employee of the city is sued personally, even if the cause of action arose out of his official duties, the corporation counsel shall appear for such officer or employee only in the case the city council directs him to do so."

The Office of Corporation Counsel is established by Chapter 6, §6-2 of the Municipal Code of Chicago. Under this ordinance the City Council has delegated to the Corporation Counsel the authority to ". . . conduct all the law business of the city" (§6-2(a)); and to . . . "[a]ppear for and protect the rights and interests of the city in all actions, suits and proceedings" (§6-2(b)). It is further provided that: ". . . when the corporation counsel is of the opinion that an appeal is not justified, he may certify such

judgment to the city comptroller at any time . . ." (§6-2(d)). Thus, the Corporation Counsel has been delegated, pursuant to ordinance, absolute discretion to determine whether to prosecute or abandon any matter on appeal. This absolute discretion vested in the Corporation Counsel by the City Council does not require the Corporation Counsel to obtain the approval of the City Council or any alderman regarding the disposition of any matter on appeal.

In the discharge of his duties as the duly appointed legal officer of the city, and in the exercise of his discretion, the Corporation Counsel has determined that further appeal of this case is not warranted and would be detrimental to the interests of the city. In the judgment of the Corporation Counsel, the decision of this court is correct and implementation of the court's order should proceed expeditiously. Further appeal would unconscionably delay the work of redistricting mandated by this court and would result in the continued disenfranchisement of a substantial portion of the city's population. The people of Chicago are entitled to have their elected representatives selected from wards drawn in compliance with the law. No party to this litigation can be harmed or compromised by a ward map drawn with the full participation of the parties and in compliance with the law.

Furthermore, additional appellate review would result in a useless waste of taxpayers money. To date, this litigation has cost the taxpayers mightily. The attorneys' fees already paid by the city include:

A. William Harte, as counsel for the City Council—$377,885.44.

B. Jerome Torshen, as counsel for Thomas Keane—$86,645.43.

C. Earl Neal, as counsel for Mayor Jane Byrne and Martin Murphy—$126,689.28.

Additionally, plaintiffs' fee demands for trial work are as follows:

A.	*Ketchum* plaintiffs	$ 357,654.46
B.	*Velasco* plaintiffs	$ 350,996.80
C.	*PACI* plaintiffs	$ 704,736.82
	TOTAL	$1,413,388.08

Continued appeal by the City Council would doubtlessly result in the continued payment of significant amounts of money in attorneys' fees for the continued appeals. Such amounts could well exceed an additional $100,000. This money would be better spent in arriving at a redistricting map consistent with the requirements of the Voting Rights Act.

The City Council in its collective wisdom has seen fit to delegate responsibility for all legal business of the city on the Corporation Counsel. It has granted him the discretion to determine in all cases whether an appeal is justified. In the sound exercise of that discretion the Corporation Counsel has concluded that further appeal of the instant matter not be prosecuted.

Despite this determination, a Petition for Rehearing was filed in this case on behalf of the City Council. This petition was filed by an attorney no longer authorized to represent the City Council and was filed without the approval of the legal representative of the City Council. As such, the Petition should not be allowed to stand and, accordingly, the Petition filed should be stricken.

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Attorney for Defendants-Appellees.

[Proof of Service and Service List omitted in printing.]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 83-2044
MARS KETCHUM, et al.,

Plaintiffs-Appellants,

vs.

JANE M. BYRNE, et al.,

Defendants-Appellees.

No. 83-2065
POLITICAL ACTION CONFERENCE OF ILLINOIS, et al.,

Plaintiffs-Appellants,

vs.

CITY COUNCIL OF THE CITY OF CHICAGO, et al.,

Defendants-Appellees.

No. 83-2126
CHARMAINE VELASCO, et al.,

Plaintiffs-Appellants,

vs.

JANE M. BYRNE, et al.,

Defendants-Appellees.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 82 C 4085, 82 C 4820, 82 C 4431, Consolidated
The Honorable **Thomas R. McMillen**, Judge Presiding.

RESPONSE OF THE CITY COUNCIL OF THE CITY OF CHICAGO AND ATTORNEY WILLIAM J. HARTE TO "MOTION TO STRIKE PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC", AND TO JUNE 8, 1984 LETTER FROM CORPORATION COUNSEL JAMES D. MONTGOMERY TO THE CLERK OF THE COURT

PREFACE

On June 7, 1984, Defendant-Appellee, THE CITY COUNCIL OF THE CITY OF CHICAGO ("the CITY COUNCIL"), filed a Petition for Rehearing With Suggestion for Rehearing En Banc ("Petition for Rehearing"), requesting that this Court rehear the appeal in this case and affirm the decision of the District Court in its entirety. By letter dated June 8, 1984, the Clerk of this Court advised all counsel that the Court had requested counsel for Plaintiffs-Appellants to file an answer to the Petition for Rehearing on or before June 22, 1984. A copy of the Clerk's letter of June 8, 1984, is attached hereto as Exhibit "A" [*See* S.App. 25].

Also on June 8, 1984, James D. Montgomery, Corporation Counsel of the City of Chicago, sent a letter to the Clerk of the Court, noting that the Petition for Rehearing had been filed by William J. Harte "acting as counsel for the City Council of the City of Chicago." Mr. Montgomery's June 8, 1984 letter referred to an earlier letter of June 6, 1984, from Mr. Montgomery to Mr. Harte, pursuant to which, according to Mr. Montgomery, Mr. Harte's "authority to represent the City Council of the City of Chicago in the above entitled matter was terminated." Mr. Montgomery's June 8, 1984 letter further stated that the Petition for Rehearing "is not authorized by the Corporation Counsel of the City of Chicago", that Mr. Montgomery "now represents the defendant, City Council of the City of Chicago," and that the "City Council does not seek a Petition for Rehearing in this matter". Attached

to Mr. Montgomery's June 8, 1984 letter was an Appearance form, stamped "RECEIVED" on June 7, 1984, by the Clerk of the Court, pursuant to which Mr. Montgomery entered his "appearance as counsel for the City Council of the City of Chicago." Also attached to Mr. Montgomery's June 8, 1984 letter was the aforementioned letter of June 6, 1984 from Mr. Montgomery to Mr. Harte. A copy of Mr. Montgomery's June 8, 1984 letter, with enclosures, is attached hereto as Exhibit "B" [*See* S.App. 27].

Also on June 8, 1984, Mr. Montgomery filed a Motion to Strike Petition for Rehearing with Suggestion for Rehearing En Banc ("Motion to Strike"). This Motion was filed by Mr. Montgomery as Corporation Counsel of the City of Chicago and, purportedly, as "Attorney for Defendants-Appellees [sic]." (Only one defendant, the City Council, remains in this case. All others were dismissed by the district court and no appeal was taken from that order.) A copy of the Motion to Strike is attached hereto as Exhibit "C" [*See* S.App. 31].

On June 11, 1984, this Court issued a Notice to Respond, pursuant to which William J. Harte was directed to respond to the Motion to Strike on or before June 15, 1984. A copy of this Court's Notice to Respond is attached hereto as Exhibit "D" [*See* S.App. 36].

Mr. Montgomery's June 8, 1984 letter to the Clerk of the Court and his Motion to Strike are obviously related to, if not inseparable from, one another. The June 8, 1984 letter asserts that Mr. Harte's authority to represent the City Council was terminated by Mr. Montgomery prior to filing the Petition for Rehearing and, further, that the "City Council does not seek a Petition for Rehearing in this matter." The Motion to Strike filed by Mr. Montgomery as "Attorney for Defendants-Appellees" seeks "to strike" the City Council's Petition for Rehearing. Because of the serious implications which attend Mr. Montgomery's communications to this Court, coupled with the fact that the Notice to Respond was directed by this Court to Mr. Harte, the instant Response is filed on behalf of the

City Council by William J. Harte as its counsel of record, and also on behalf of William J. Harte by his privately retained counsel, Richard J. Prendergast.

RESPONSE

In response to the Motion to Strike Petition for Rehearing With Suggestion for Rehearing En Banc and in response to Mr. Montgomery's June 8, 1984 letter to the Clerk of the Court, the City Council and William J. Harte state as follows:

1. On May 17, 1984, a three judge panel of this Court[1] issued an Opinion in consolidated appeal Nos. 83-2044, 83-2065 and 83-2126 remanding these cases to the District Court for further proceedings. As the City Council has since argued in its Petition for Rehearing With Suggestion for Rehearing En Banc, this Court's decision "is of exceptional importance for it is, to Petitioner's knowledge, a case of first impression not only for this Court, but for any federal appellate court in the country, including the Supreme Court of the United States. Thus, at the present time, this Court's Opinion applying Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, as amended on June 29, 1982, by Pub. L. No. 97-205, to single-member districts is the controlling precedent of the land." (Petition for Rehearing, p. 1.)

2. The City Council was named as a defendant in this case because, allegedly, it had not discharged in a lawful manner its statutory duty [Ill. Rev. Stat. Ch. 24, § 21-38] to redistrict the wards within the City of Chicago following the 1980 census. (See Ketchum Complaint as ¶22.) Chapter 24, § 21-38 provides that "it shall be the *duty*

[1] The panel consisted of Circuit Judges Cudahy and Wood and Senior District Judge Robert J. Kelleher of the Central District of California, sitting by designation. The majority opinion was authored by Judge Cudahy; Judge Wood authored a separate concurring opinion.

of the City Council" to redistrict the City into fifty wards and that, on or before the first day of December of the year following the year in which the national census is taken, and every ten years thereafter, " *the City Council shall* by ordinance redistrict the city on the basis of the national census of the preceding year . . . ." (Emphasis added.) The statute clearly imposes the duty to redistrict upon "the City Council", and the Complaint in this case clearly alleges that that duty has not been discharged in a lawful manner. Following its statutory compliance, the City Council was sued and, like any other party, had a right to retain counsel. As discussed and documented more fully *infra*, Mr. Harte was retained to represent the City Council for this purpose. As further demonstrated *infra*, a majority of the City Council has never authorized or approved the termination or attempted termination of that attorney-client relationship, and, indeed, a majority of the City Council has specifically directed Mr. Harte to take all action necessary to appeal the aforesaid decision of this Court.

3. After the *Ketchum* Complaint was filed in this case, Mr. Harte was contacted and retained to represent the City Council. The firm of Earl L. Neal was appointed Special Assistant Corporation Counsel to represent Mayor Jane M. Byrne and Commissioner Martin Murphy, both of whom had been named as defendants in the case. The firm of Jerome H. Torshen, Ltd. was retained to represent Thomas Keane who assisted in the redistricting process. Mr. Harte was not appointed as a Special Assistant Corporation Counsel, but instead was retaind directly by the City Council to provide independent representation of that defendant. Attached hereto are letters from William J. Harte, dated August 2, 1982 and September 10, 1982, to Edward R. Vrdolyak and Robert R. Retke in their respective capacities as President Pro Tem of the City Council (the Mayor, the President of the Council, was separately sued) and Assistant Corporation Counsel for the City of Chicago. (Exhibits "E" and "F".) [*See* S.App.

38, 39]. As the September 10, 1982 letter to Mr. Retke (Exhibit "F") indicates, the decision to retain Mr. Harte "directly by the Council instead of going through the usual procedure of being appointed Special Assistant Corporation Counsel" was a matter discussed prior to Mr. Harte's appointment and, while Mr. Harte observed (perhaps prematurely) that "I do not perceive the magic of any specific form", the fact remains, to the extent that it is material which we deny, that Mr. Harte was not thereafter appointed as a Special Assistant Corporation Counsel.

4. Mr. Harte's status as independent counsel for the City Council was demonstrated from time-to-time thereafter by correspondence specifically stamped "privileged" from Mr. Harte to members of the City Council. But the clearest evidence of the direct attorney-client relationship between Mr. Harte and the City Council is reflected in correspondence exchanged in mid-1983 between Mr. Montgomery, then Acting Corporation Counsel, and Mr. Harte. Following the completion of the trial phase of these cases, the various plaintiffs' counsel filed with the Court petitions for attorneys' fees and for the reimbursement of expenses. (See Motion to Strike Petition for Rehearing With Suggestion for Rehearing En Banc at p. 5.) After the filing of these petitions, Mr. Harte wrote to Mr. Neal who, as previously noted, had been appointed a Special Assistant Corporation Counsel in these cases. Mr. Harte expressed the understanding that Mr. Neal would defend the City with respect to plaintiffs' petitions for attorneys' fees. A copy of Mr. Harte's letter to Mr. Neal was sent to James Montgomery, then Acting Corporation Counsel for the City of Chicago.

5. By letter dated August 11, 1983, a copy of which is attached hereto as Exhibit "G" [*See* S.App. 41], Mr. Montgomery responded directly to Mr. Harte with respect to this matter. The full text of Mr. Montgomery's letter states as follows (emphasis added):

Dear Mr. Harte:

This letter is in response to your letter to Mr. Neal of August 9, 1983, a carbon of which you directed to me.

It appears that some misunderstanding has occurred with respect to my involvement in this matter. It has never been my intention to participate in any negotiations with respect to pending fee petitions in these cases although I have informally suggested to certain of the petitioners that their requests are, in my judgment, very high. *In view of the fact that the fees are sought against the City Council and because the Council has retained its own counsel in this matter it would seem to me to be inappropriate for the Law Department to interject itself into the matter at this time. For this reason, it would also seem that the involvement of Mr. Neal, who has participated in the defense of this matter as a Special Assistant Corporation Counsel may be similarly inappropriate.*

Of course, if the City Council wished to retain Mr. Neal in a manner similar to that in which they have retained your own services that would be quite a different matter and I would express no opinion with respect to such an arrangement.

Very truly yours,

James D. Montgomery
Acting Corporation Counsel

6. Mr. Harte responded to Mr. Montgomery's letter of August 11, 1983 by letter dated August 15, 1983, stating, *inter alia*, that "I accept the fact that the fees are sought against the City Council, and I accept the obligation of representing the Council in the fee petitions." (Exhibit "H".) [*See* S.App. 42].

7. As the foregoing clearly establishes, Mr. Harte was retained to independently represent the City Council as

a party in this litigation, a fact specifically recognized by the Corporation Counsel. With respect to Mr. Harte's authority to proceed with the appeal from this Court's decision, it should also be noted that after the Court's decision of May 17, 1984, Mr. Harte advised the membership of the City Council of the Court's decision and of his intention to appeal this Court's decision further. In response to that communication, a minority of the City Council membership, by letter dated May 30, 1984 (Exhibit "I") [*See* S.App. 44], instructed Mr. Harte to end all efforts toward the reversal of this Court's decision. However, a majority of the City Council membership, by letter dated June 1, 1984 (Exhibit "J") [*See* S.App. 46], instructed Mr. Harte as follows:

> The undersigned members of the Chicago City Council, representing a majority of the City Council, hereby direct and authorize you immediately to take all action necessary to appeal the decision of the Seventh Circuit United States Court of Appeals in the matter of *Mars Ketchum, et al. v. Jane M. Byrne, et al.*, numbers 83-2044, 83-2065 and 83-2126. Your prompt attention to this matter will be greatly appreciated.

8. In response to the direction received from a majority of the City Council, Mr. Harte completed preparation of the Petition for Rehearing. Under Order of this Court, the Petition was required to be filed on June 7, 1984. In the late afternoon of June 6, 1984, Mr. Harte received the June 6, 1984 letter from Mr. Montgomery pursuant to which Mr. Montgomery purported to terminate Mr. Harte's authority to represent the City Council. In accordance with the direction received from the majority of the City Council, Mr. Harte completed the Petition for Rehearing, and thereafter filed the Petition in a timely manner on June 7, 1984.

9. By letter dated June 7, 1984 (Exhibit "K") [*See* S.App. 48], Mr. Harte advised all members of the City Council as follows:

Ladies and Gentlemen:

Pursuant to my letter of May 23, 1984, I have received communications from twenty of you who have instructed me to end all efforts directed toward the reversal of the decision of the Seventh Circuit Court of Appeals. I have received written direction from twenty-six of you to exert all efforts toward the reversal of the decision. I have also received a letter from the Corporation Counsel, upon directions from the Mayor, purporting to discharge me on the eve of the last filing date for the Petition for Rehearing in the Seventh Circuit Court of Appeals, and indicating that any requested compensation for the work of my firm will be resisted.

As you know, there has been no unanimity of opinion of Council members in this litigation since its onset. Several members of the Council are named plaintiffs and are represented by independent counsel. I have attempted, as best I can, to advance the will of the Council as demonstrated by a majority of its members, while keeping all members of the Council advised as to the proceedings. At all times, individual members have had the opportunity to be represented by separate counsel.

As I view my professional responsibility, I must continue to advance the will of the Council as demonstrated by a majority of the members. Consequently, I expect to extend my efforts in seeking a reversal of this decision as requested by a majority of the members.

Very truly yours,

William J. Harte

10. As the attachments to Exhibit "B" show, Mr. Montgomery purported to terminate Mr. Harte's authority to represent the City Council by letter dated June 6, 1984 and, the following day, entered his appearance as "counsel

for the City Council of the City of Chicago" [*See* S.App. 30]. Mr. Montgomery then filed his Motion to Strike the Petition for Rehearing.

11. Two other communications in connection with this matter are pertinent. Attached hereto as Exhibit "L" is a June 6, 1984 letter from Mayor Harold Washington to Alderman Edward Burke [*See* S.App. 50]. Attached hereto as Exhibit "M" is a letter from Alderman Burke to Corporation Counsel James D. Montgomery [*See* S.App. 52].

12. With respect to Mayor Washington's June 6, 1984 letter, it should be noted that prior to his election to the office of Mayor, then Congressman Harold Washington testified on behalf of the plaintiffs in the *Ketchum* case, a fact specifically noted in this Court's Opinion (Slip Op. at 32). Mayor Washington's June 6, 1984 letter specifically recognizes that "The City Council of the City of Chicago has the statutory responsibility to redistrict the wards of Chicago every ten years." In his June 6, 1984 letter, Mayor Washington further states that "I endorse the decision of the Court of Appeals . . .", and "I am directing the Corporation Counsel to take the steps necessary to end this litigation and comply with the court's mandate."

13. Alderman Burke's June 8, 1984 letter to Mr. Montgomery (Exhibit "M") also notes that the City Council "was sued as a defendant because it allegedly failed to discharge its statutory duties", and advises that "the Council majority takes the position, now, as then, that it did not breach its duties. However, Mayor Washington, whom you represent, apparently has an opposite view." Under these circumstances, Alderman Burke expressed the view to Mr. Montgomery that "there is a conflict of interest of staggering proportions, which completely bars you from representing the Council majority." Alderman Burke acknowledged that the Corporation Counsel may act as attorney for both the City Council and the Mayor "as long as there is no conflict of interest", but asserted that such a conflict clearly exists in this case in view of Mayor Washington's direction to Mr. Montgom-

ery to "take all steps necessary to end this litigation and comply with the (Seventh Circuit Court of Appeals) mandate." Since it "is indisputable that a majority of the City Council wishes to appeal this decision", Alderman Burke advised Mr. Montgomery that "[a] majority of the City Council will not consent to your representation of their interests in *Ketchum v. Byrne*." Alderman Burke's letter of June 8, 1984, concludes:

> "Therefore, your action in discharging Mr. Harte, as counsel for the City Council majority, contrary to their wishes, was precipitous and appears to be an attempt to deprive these defendants of counsel of their choice who will exercise independent professional judgment on their behalf. Therefore, you are hereby advised that your services as counsel in the matter of *Ketchum v. Byrne* will not be necessary on behalf of the City Council majority."

ARGUMENT

As the foregoing factual recitation makes clear, Mr. Harte was, is and until a majority of the City Council directs otherwise, or until he desires and is permitted to withdraw, will remain the defendant City Council's attorney in this matter. The City Council has been sued for allegedly failing to discharge its statutory duty to properly and lawfully redistrict Chicago's 50 wards. The Mayor of Chicago, who testified as a witness in these proceedings on behalf of the plaintiffs, understandably wishes to insulate this Court's decision from any review. A majority of the City Council, the party defendant, seeks precisely the opposite result and has directed its attorney to take all steps necessary to appeal this Court's decision. As evidenced by Mayor Washington's June 6, 1984 letter to Alderman Burke (Exhibit "L") [*See* S.App. 50], the steps taken by Mr. Montgomery (1) in attempting to terminate Mr. Harte's authority to represent the City Council, (2) in filing his appearance on behalf of the City Council, (3) in advising the Clerk of this Court that the

"defendant City Council does not seek a Petition for Rehearing this matter", and (4) in filing a Motion to Strike the Petition for Rehearing, are actions taken at the direction of Mayor Washington and are contrary to the wishes of a majority of the City Council.

Mr. Harte's professional responsibility in this matter, however, forecloses him from acceding to Mr. Mortgomery's direction even were Mr. Montgomery "his employer". Mr. Harte's actions are totally in accord with the directions of his client, the City Council. Not only did Mr. Harte act within the authority vested in him by a majority of the City Council, but, indeed, it is quite clear that to have failed to file the Petition for Rehearing would have been in clear violation of the Code of Professional Responsibility (Rules of the Supreme Court of Illinois, Article VIII). Rule 2-110 concerns "Withdrawal From Employment". Sub-section (a)(2) of that Rule provides that "a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules". Had Mr. Harte followed Mr. Montgomery's "direction" of June 6, 1984 (see Exhibit "B" attachments), the rights of his client, the City Council, would have been severely prejudiced by his withdrawal, particularly since the Petition for Rehearing had to be filed, if at all, not later than the following day, June 7, 1984.

In this regard, Sub-section (c) of Rule 2-110 ("Permissive Withdrawal") provides that a lawyer may not request permission to withdraw on matters pending before a tribunal, and may not withdraw on other matters, unless certain specific circumstances exist. A copy of the Rule is attached hereto as Exhibit "N" [*See* S.App. 55]. Quite clearly, none of those circumstances exists in this case and, accordingly, Mr. Harte could not have withdrawn from this matter without permission of a majority of the City Council, even if he had wanted to do so.

According to Mr. Montgomery's Motion to Strike the Petition for Rehearing, the claimed authority for his attempted termination of the attorney-client relationship between the City Council and Mr. Harte, and for his Motion to Strike the Petition for Rehearing, is found at Ill. Rev. Stat. Ch. 24, § 21-11 and Ch. 6, § 6-2 of the Municipal Code of Chicago (Motion to Strike Petition for Rehearing at pp. 3-4). Neither of those provisions in any way forecloses the City Council from retaining its own attorney, particularly where the City Council has been sued as a body for failing to discharge statutory obligations imposed directly upon it by statute. As the Supreme Court of Illinois stated in *Indiana Harbor Belt Railroad Co. v. Calumet City*, 391 Ill. 280, 63 N.E.2d 369 (1945), "[u]nless there was fraudulent design, the employment of special counsel to represent the City was a matter which rested in the discretion of the City Council." 63 N.E.2d at 373.

Nor is there anything new about what is happening here. There has been widespread public knowledge of disputes and even litigation between the executive and legislative branches of the City. See *Roti v. Washington*, 114 Ill.App.3d 958, 450 N.E.2d 465 (1st Dist. 1983), *leave to appeal denied*, 450 N.E.2d 336 (1983). No one questions the Corporation Counsel's general authority to represent the City in litigation involving the City or its officers, including at times the City Council. See *O'Neill v. City of Chicago*, 169 Ill.App. 546 (1912). However, that general authority to represent the City does not include the right to take action in connection with any particular litigation contrary to the express desires of the City Council. In *O'Neill*, for example, decided over 70 years ago, it was held that the release and waiver of an appeal by the Corporation Counsel was without lawful effect where the Corporation Counsel was directed by the City Council to pursue the appeal.

Similarly, in *Hotchkiss v. Calumet City*, 377 Ill. 615, 37 N.E.2d 332 (1941), the Illinois Supreme Court held that the authority to prosecute or abandon an appeal rests with the City Council. In that case, the Mayor of Calumet

City and two Aldermen sought to appeal the issuance of a writ of mandamus. Even though the Mayor and the two Aldermen were among the named defendants, the Court held that their interest in taking an appeal was subject to the will of a majority of the City Council. Since a majority of the City Council had voted not to take an appeal, the Court held that the appeal could not be taken by the Mayor or the other two aldermen, and accordingly, the appeal was dismissed.

Likewise, in *People ex rel. Altorfer v. City of Peoria*, 378 Ill. 572, 39 N.E.2d 42 (1942), the City of Peoria and the Commissioner of Buildings for the City of Peoria were named in a mandamus action which resulted in the issuance of a writ of mandamus. Citing *Hotchkiss*, the Illinois Supreme Court held that any interest which the Mayor or the Commissioner of Buildings might have in appealing the Order was subject to the will of a majority of the City Council. "The action of the Council on July 22, previously narrated [directing that no appeal be taken], was the action of the City as a corporation. It follows, necessarily, that all subsequent steps taken to prosecute the appeal were not only without the authorization of the municipal corporation but directly contrary to its command." 39 N.E.2d at 44.

The *Altorfer* Court also held that, since the attorney who had been representing the City did not follow the City Council's direction to dismiss the appeal, "the City Council found it necessary to employ other special counsel for this purpose. Defendants' Motion to Dismiss the appeal, filed by attorney Rauch, [the new special counsel] must be allowed, and the Motion of their former special counsel to strike the motion filed by attorney Rauch is denied."[2] 39 N.E.2d at 44.

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[2] See also *Sackett v. City of Morris*, 149 Ill.App. 152 (1909), and cases cited therein. In *Sackett* the Court held that the City Attorney was duty bound to obey the directions of the City Council with respect to the settlement of litigation. The City attorney

(Footnote continued on following page)

In *Quinn v. The Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago, et al.*, 7 Ill.App.3d 791, 289 N.E.2d 117 (1st Dist. 1972), Robert J. Quinn, former Fire Commissioner of the City of Chicago, brought an administrative review action to compel the Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago to accept his payment to the Fund in order to establish his right to a higher pension. The Board of Trustees, by a four-to-four vote, had refused to accept the payment; the trial court thereafter reversed and directed that the Board accept payment so that Quinn would qualify for the higher pension. The four members of the Board who voted against accepting the payment filed an appeal. Quinn filed a Motion to Dismiss the appeal and, in addition, the "Corporation Counsel of the City of Chicago, who by law (Ill. Rev. Stat. 167, Ch. 108½, par. 6-208), represents the Board of Trustees of the Fund, has also filed a Motion to Dismiss the appeal on the same gounds." 289 N.E.2d at 119. The Motions to Dismiss were denied: "Since that decision [of the Board] was reversed by Order of the Circuit Court, we believe that it would be improper and that ends of justice would not be best served if appellants were foreclosed from obtaining any review of that Order." 289 N.E.2d at 121.

Regardless of the Corporation Counsel's general authority to represent the City, the foregoing authorities make clear that no such authority exists contrary to the will of a majority of the City Council, especially in litigation where the City Council is a defendant. In the instant case,

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[2] *continued*
argued that, because of certain ordinances adopted by the City Council, the City Attorney "became the sole authority in behalf of the City which could settle this suit." The Court disagreed, holding that even if the ordinances in question purported to deprive the City Council of its authority to compromise litigation "they would be invalid, for the *legislature* has placed the control of the business affairs of the City in the City Council, and the City Council cannot deprive itself of the duty to exercise that control." 149 App. at 159-160. (Emphasis added.)

a majority of the Council had directed that the appellate process continue. Indeed, the City Council's authority to determine whether further appeal should be taken in this case is particularly clear, since the City Council is the party defendant. Neither the Corporation Counsel nor the Mayor has the authority to interfere with the attorney-client relationship existing between the City Council and its attorney, and neither has the authority to direct that further appeals be abandoned. As the Court held in *West v. Bank of Commerce and Trust, et al.*, 167 F.2d 664 (4th Cir. 1948) "[t]he ordinary rule is that an attorney at law has no authority, without his client's permission, to compromise his client's claim and this rule seems to apply to attorneys for municipalities as well as to attorneys for private individuals [citations omitted]". 167 F.2d at 666.

The Motion to Strike the Petition for Rehearing seeks to avoid this result by selectively quoting from Chapter 6, § 6-2 of the Municipal Code of the City of Chicago, that "[w]hen the Corporation Counsel is of the opinion that an appeal is not justified, he may certify such judgment to the City Comptroller at any time . . .". (§ 6-2(d)) [*See* Corp. Counsel Br. in Opp., Ex. 1-2]. However, the Municipal Code makes clear that the Corporation Counsel's authority to settle cases is limited to the City Council's direction. Chapter 6, § 6-8 makes clear, "[t]he corporation counsel shall have the authority, *when directed by the City Council,* to make settlements of lawsuits in controverted claims against the City." (Emphasis added.) [*See* Corp. Counsel Br. in Opp., Ex. 3]. In any event, a full quotation of § 6-2(d) shows that the "authority" in the section relates to money judgments against the City, and specifically to the certification of such judgments to the City Comptroller. The full text of sub-section (d) is as follows:

> "(d) Certify to the city comptroller all judgments rendered against the city as of the date following the last day on which appeal may be made, when in the opinion of the corporation counsel no further proceedings are proper; provided, that when the corporation counsel is of the opinion that an appeal is not

> justified, he may certify such judgment to the city comptroller at any time, and provided further, that when a judgment is rendered against any member of the police department for injury to person or property resulting from the performance of his duties as a policeman, he shall certify such judgment to the city comptroller for payment by the city, when, in his opinion, such member of the police department has not been guilty of wilful misconduct and the corporation counsel is of the opinion that an appeal is not justified.

Obviously, the Corporation Counsel does not have the unfettered authority to abandon any appeal at his sole discretion, and he certainly has no such authority where a majority of the City Council directs otherwise, particularly where the City Council is named as a party defendant. As we have stated heretofore, if the City ordinances purport to remove such control from the Council and place it with an attorney, it would be invalid as contrary to state law. See *Sackett v. City of Morris*, 149 Ill.App. 152 (1909).

In any event, the authority of the Corporation Counsel does not include the authority to represent conflicting interests in the same litigation, and where such a conflict exists between the Mayor and the views of a majority of the City Council, the appropriate course of action is for the City Council to retain independent counsel. See *Kay v. Board of Higher Education of the City of New York*, 20 N.Y.Supp.2d 898 (1940); *Krahmer v. McClafferty*, Del. Super., 282 A.2d 631 (1971); *City of Tukwila v. Todd*, 17 Wash.App. 401, 563 P.2d 223 (1977); *Guzzetta v. Cary*, 166 N.Y.Supp.2d 434 (1957); *Judson v. City of Niagara Falls*, 124 N.Y.Supp. 282 (1910). In the instant case, not only does a conflict exist, but the City Council is the party defendant in this litigation. It has a right to be represented by an attorney who will follow its directions. It could not be clearer that the Corporation Counsel in this case has no intention of doing so.

Ironically, the basis asserted by Mr. Montgomery for attempting to terminate Mr. Harte's authority to represent the City Council was the claimed absence of conflicting interests and loyalties (see June 6, 1984 letter from Mr. Montgomery to Mr. Harte, Exhibit "B" attachment).[3] In his June 6 letter Mr. Montgomery maintained that, since Mayor Byrne and Commissioner Murphy were no longer defendants in the case, there was no need for the City Council to be represented by independent counsel. Of course, if that were true, Mr. Montgomery would not have had to disqualify himself and Mr. Neal from consideration of plaintiffs' fee petitions in August of 1983 (see Exhibit "G"), since Mayor Byrne and Commissioner Murphy had been dismissed as defendants well before then. The need for separate counsel at the time the *Ketchum* case was filed derived, in part, from the *possibility* of a conflict of interest. The need for separate counsel to repre-

[3] As an additional basis to justify the actions taken by the Corporation Counsel, the Motion to Strike the Petition for Rehearing recites the "attorneys' fees already paid by the City" (Motion to Strike at p. 5). Those figures do not represent attorneys' fees paid to the three attorneys named in the Motion, but rather the total amounts paid to their *firms* for attorneys' fees and litigation expenses. As Exhibit "E" indicates, Mr. Harte represented the City Council in this litigation at a charge of $100 per hour for his time, $60 per hour for associate time and $30 per hour for paralegal time. Four associates assisted in his representation of the City Council, one of whom (Jeffrey Whitt) has spent far more time on these cases since they were filed than on any other matter. In addition, in this litigation, Mr. Harte has employed, from time-to-time, a total of 16 paralegals and advanced over $61,000.00 in costs and expenses. These expenses and the salaries of associates and paralegals have been borne by Mr. Harte; reimbursement of expenses and legal fees have been billed at the aforesaid reduced rates. The other two firms have had similar experiences. Mr. Torshen was assisted by an associate from his firm. Mr. Neal was assisted by two associates and two paralegals from his firm. The representation of defendants by both of these latter firms ended over a year and a half ago when their clients were dismissed at the end of the plaintiffs' cases.

sent the defendant City Council at this time derives from the *actual* existence of conflicting interests and divided loyalties. (See Mayor Washington's letter to Mr. Burke of June 6, 1984 (Exhibit "M") and the City Council majority's direction to Mr. Harte (Exhibit "J").) In this litigation, Mr. Montgomery cannot follow the direction of Mayor Washington and the direction of a majority of the City Council when those directions conflict, and he has chosen to follow the direction of the Mayor. It is clear, therefore, that the present action which he desires to take is not available to him—i.e., in accordance with the Mayor's directions, to impede an existing attorney-client relationship and seek to represent a party defendant in pending litigation in a manner directly contrary to that party's explicit preference and direction. There is no statute or ordinance in existence which, conceivably, could permit the Corporation Counsel to take such action and thereby foreclose review of this Court's decision by way of a Petition for Rehearing.

Respectfully submitted,

/s/ William J. Harte
Attorney for Defendant-Appellee-Petitioner
The City Council of the City of Chicago

/s/ Richard J. Prendergast
Attorney for William J. Harte

[Certificate of Service omitted in printing.]

EXHIBIT "A"

(Letterhead Of)
UNITED STATES COURT OF APPEALS
For The Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

June 8, 1984

Jeffrey D. Colman
JENNER & BLOCK
One IBM Plaza
Chicago, IL 60611

Barry T. McNamara
D'ANCONA & PFLAUM
30 North LaSalle St.
Chicago, IL 60602

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Joaquin G. Avila
Mexican American Legal Defense & Education Fund, Inc.
28 Geary Street
San Francisco, CA 94108

Raymond G. Romero
Mexican American Legal Defense & Education Fund, Inc.
343 S. Dearborn St.
Suite 910
Chicago, IL 60604

Re: Nos. 83-2044, 83-2065, 83-2126 Consolidated—Mars Ketchum, et al., and Charmaine Velasco, et al., and Political Action Conference of Illinois, et al., and Stanley Pillman, et al. and United States of America v. Byrne, et al. and The City Council of the City of Chicago

Dear Counsel:

The Court has directed the Clerk to request counsel for plaintiffs-appellants Mars Ketchum, et al., Political Action Conference of Illinois, et al. and Charmaine Velasco, et al., to file an answer to the petition for rehearing with suggestion for rehearing en banc filed by counsel for defendant-appellee, City Council of the City of Chicago, in the above cause.

Twenty-five copies of the answer, not to exceed fifteen pages in length and bound by the same color cover as your brief, will be required. They will be due by June 22, 1984.

Sincerely yours,

Thomas F. Strubbe
[Clerk]

TFS/mjc
cc:
William J. Harte, Ltd., 111 W. Washington, Chicago, IL 60602
James D. Montgomery, Corporation Counsel, 511 City Hall, Chicago, IL 60602
Jerome H. Torshen, 39 S. LaSalle St., Suite 1400, Chicago, IL 60603
Samuel J. Ruffolo, BAUM & RUFFOLO, 1 N. LaSalle, Chicago, IL 60602
William Bradford Reynolds, Assistant Attorney General, Department of Justice, 10th & Pennsylvania Ave., N.W. Washington, D.C. 20530

EXHIBIT "B"

(Letterhead Of)
CITY OF CHICAGO
Department of Law

June 8, 1984

Thomas F. Strubbe, Clerk
United States Court of Appeals
for the Seventh Circuit
27th Floor, 219 South Dearborn Street
Chicago, Illinois 60604

Re: *Ketchum v. Byrne,* Nos. 83-2044, 83-2065 and 83-2126.

Dear Mr. Strubbe:

You are in receipt of a Petition for Rehearing filed by defendant, City Council of the City of Chicago, in the above entitled action. The Petition was filed by Mr. William J. Harte acting as counsel for the City Council of the City of Chicago.

On June 6, 1984, Mr. Harte was informed by the Corporation Counsel of the City of Chicago that his authority to represent the City Council of the City of Chicago in the above entitled matter was terminated. (A copy of this notification is attached hereto.) On June 7, 1984, the appearance of the Corporation Counsel of the City of Chicago as counsel for the defendant, City Council of the City of Chicago, was filed with the Court. (A copy of this appearance is also attached hereto.)

Please advise the Court that the Petition for Rehearing filed by Mr. Harte in the above matter is not authorized by the Corporation Counsel of the City of Chicago who now represents the defendant, City Council of the City of Chicago. The defendant City Council does not seek a Petition for Rehearing in this matter.

Very truly yours,

/s/ James D. Montgomery
Corporation Counsel

Enclosures
cc: All counsel of record

(Letterhead Of)
CITY OF CHICAGO
Department of Law

June 6, 1984

William J. Harte, Esq.
111 West Washington Street
Suite 2025
Chicago, Illinois 60602

Re: *Ketchum v. Byrne*

Dear Mr. Harte:

This letter is sent regarding your continued representation of the City Council of the City of Chicago in the above entitled action. As you are aware, your representation of the City Council was a result of a possible conflict between defendant Jane Byrne, Mayor of the City of Chicago, and defendant City Council. Due to this conflict the Corporation Counsel determined that he could not represent both the Mayor and the City Council and you were appointed to represent the City Council.

The opinion of the United States Court of Appeals for the Seventh Circuit entered on May 17, 1984, clearly eliminates Jane Byrne as a defendant in this case. Accordingly, the conflict which led to your appointment to represent the City Council no longer exists.

Pursuant to Chapter 24, paragraph 21-11 of the Illinois Revised Statutes, the Corporation Counsel has the duty as legal advisor to the City Council to appear and defend the rights of the City in all legal proceedings. This duty is also contained in Chapter 6 of the Municipal Code of Chicago which requires the Corporation Counsel to appear and defend all suits and proceedings brought against the City of Chicago and its legal entities.

Because no basis now exists which would prevent the Corporation Counsel from carrying out his statutory duty to defend the *Ketchum* litigation, you are hereby advised that effective this date your authority to represent the

City Council in the *Ketchum* litigation is terminated. Please arrange to transfer your files in this case to our office. We will prepare the necessary pleadings required to substitute counsel in the litigation.

Very truly yours,

JAMES D. MONTGOMERY
Corporation Counsel

JDM/hgo
cc: Counsel of Record

APPEARANCE FORM

UNITED STATES COURT OF APPEALS
for the Seventh Circuit
Chicago, Illinois 60604

Cause Nos. 83-2044, 83-2065 and 83-2126

Mars Ketchum, et al.,

vs.

Jane M. Byrne, et al.,

The Clerk will enter appearance as counsel for the City Council of the City of Chicago

/s/ James D. Montgomery
Corporation Counsel of the City of Chicago
511 City Hall, Chicago, Illinois 60602
744-6900

* * * * *

U.S.C.A.-7th Circuit
Received
JUN 7 1984
Thomas F. Strubbe
Clerk
(Stamp)

EXHIBIT "C"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 83-2044, 83-2065, 83-2126 Consolidated

MARS KETCHUM, et al.,
Plaintiffs-Appellants,

and

CHARMAINE VELASCO, et al.,
Plaintiffs-Appellants,

and

POLITICAL ACTION CONFERENCE OF ILLINOIS, et al.,
Plaintiffs-Appellants,

and

STANLEY PILLMAN, et al.,
Plaintiffs-Intervenors,

and

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,

vs.

JANE M. BYRNE, et al.,
Defendants,

and

THE CITY COUNCIL OF THE CITY OF CHICAGO,
Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 82 C 4085, 82 C 4431, 82 C 4820, Consolidated.
The Honorable **Thomas R. McMillen**, Judge Presiding.

MOTION TO STRIKE PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

NOW COMES the CITY COUNCIL of the City of Chicago, defendant-appellee, by its attorney, JAMES D. MONTGOMERY, Corporation Counsel of the City of Chicago, and moves this honorable court for entry of an order striking the Petition for Rehearing, With Suggestion For Rehearing En Banc, filed on June 7, 1984, in the above-captioned cause. In support of this motion, defendant-appellee states as follows:

STATEMENT OF FACTS

On May 17, 1984, this court entered its decision in this litigation finding that the City Council of the City of Chicago had violated the Voting Rights Act in its 1981 redistricting of the city's wards. This court remanded this case to the district court for the purpose of drawing a ward map that meets the requirements of the Voting Rights Act.

By letter dated June 6, 1984 (Appendix A), the Corporation Counsel of the City of Chicago notified WILLIAM HARTE, counsel for the defendant-appellee City Council of the City of Chicago, that his authority to represent the City Council in this litigation was immediately terminated and that the Corporation Counsel had exercised his statutory duty to represent the City Council. The letter terminating the employment of William Harte as counsel for the City Council was personally served on Mr. Harte. On June 7, 1984, the Corporation Counsel filed his appearance as attorney for the City Council with this Court.

Despite receipt of the letter terminating his employment, Mr. Harte, purportedly acting as counsel for the City Council, filed on June 7, 1984, a Petition for Rehearing, With Suggestion For Rehearing En Banc in this case. This Petition was not authorized by the Corporation Coun-

sel. In a footnote in the Petition (Petition, p. 1), counsel indicated that he was instructed by a majority of the aldermen of the City Council ". . . to take all action necessary to appeal the decision in this case."

ARGUMENT

The duties, power, and authority of the Corporation Counsel are established by statute and ordinance. Creation of the Office of Corporation Counsel is authorized by the Illinois Municipal Code, section 3-7-1, Ill. Rev. Stat. 1983, ch. 24, par. 3-7-1. A description of the duties and powers of the Office of Corporation Counsel is found in Ill. Rev. Stat. 1983, ch. 24, par. 21-11. This section reads as follows:

> "The head of the law department of the city shall be the corporation counsel. The corporation counsel shall be and act as the legal advisor of the city council and the several officers, boards and departments of the city. He shall appear for and protect the rights and interests of the city in all actions, suits, and proceedings brought by or against it or any city officer, board or department, including actions for damage when brought against such officer in his official capacity; provided, however, that when an officer or employee of the city is sued personally, even if the cause of action arose out of his official duties, the corporation counsel shall appear for such officer or employee only in the case the city council directs him to do so."

The Office of Corporation Counsel is established by Chapter 6, §6-2 of the Municipal Code of Chicago. Under this ordinance the City Council has delegated to the Corporation Counsel the authority to ". . . conduct all the law business of the city" (§6-2(a)); and to . . . "[a]ppear for and protect the rights and interests of the city in all actions, suits and proceedings" (§6-2(b)). It is further provided that: ". . . when the corporation counsel is of the opinion that an appeal is not justified, he may certify such

judgment to the city comptroller at any time . . ." (§6-2(d)). Thus, the Corporation Counsel has been delegated, pursuant to ordinance, absolute discretion to determine whether to prosecute or abandon any matter on appeal. This absolute discretion vested in the Corporation Counsel by the City Council does not require the Corporation Counsel to obtain the approval of the City Council or any alderman regarding the disposition of any matter on appeal.

In the discharge of his duties as the duly appointed legal officer of the city, and in the exercise of his discretion, the Corporation Counsel has determined that further appeal of this case is not warranted and would be detrimental to the interests of the city. In the judgment of the Corporation Counsel, the decision of this court is correct and implementation of the court's order should proceed expeditiously. Further appeal would unconscionably delay the work of redistricting mandated by this court and would result in the continued disenfranchisement of a substantial portion of the city's population. The people of Chicago are entitled to have their elected representatives selected from wards drawn in compliance with the law. No party to this litigation can be harmed or compromised by a ward map drawn with the full participation of the parties and in compliance with the law.

Furthermore, additional appellate review would result in a useless waste of taxpayers money. To date, this litigation has cost the taxpayers mightily. The attorneys' fees already paid by the city include:

A. William Harte, as counsel for the City Council—$377,885.44.

B. Jerome Torshen, as counsel for Thomas Keane—$86,645.43.

C. Earl Neal, as counsel for Mayor Jane Byrne and Martin Murphy—$126,689.28.

Additionally, plaintiffs' fee demands for trial work are as follows:

A.	*Ketchum* plaintiffs	$ 357,654.46
B.	*Velasco* plaintiffs	$ 350,996.80
C.	*PACI* plaintiffs	$ 704,736.82
	TOTAL	$1,413,388.08

Continued appeal by the City Council would doubtlessly result in the continued payment of significant amounts of money in attorneys' fees for the continued appeals. Such amounts could well exceed an additional $100,000. This money would be better spent in arriving at a redistricting map consistent with the requirements of the Voting Rights Act.

The City Council in its collective wisdom has seen fit to delegate responsibility for all legal business of the city on the Corporation Counsel. It has granted him the discretion to determine in all cases whether an appeal is justified. In the sound exercise of that discretion the Corporation Counsel has concluded that further appeal of the instant matter not be prosecuted.

Despite this determination, a Petition for Rehearing was filed in this case on behalf of the City Council. This petition was filed by an attorney no longer authorized to represent the City Council and was filed without the approval of the legal representative of the City Council. As such, the Petition should not be allowed to stand and, accordingly, the Petition filed should be stricken.

JAMES D. MONTGOMERY,
Corporation Counsel of the
City of Chicago,
511 City Hall, Chicago, Illinois 60602,
Attorney for Defendants-Appellees.

[Proof of Service and Service List omitted in printing.]

EXHIBIT "D"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 11, 1984

By the Court:

No. 83-2044 MARS KETCHUM, et al., *Plaintiffs-Appellants,* vs. JANE M. BYRNE, et al., *Defendants-Appellees.*	No. 82 C 4085
No. 83-2065 POLITICAL ACTION CONFERENCE OF ILLINOIS, et al., *Plaintiffs-Appellants,* vs. CITY COUNCIL OF THE CITY OF CHICAGO, et al., *Defendants-Appellees.*	No. 82 C 4820
No. 83-2126 CHARMAINE VELASCO, et al., *Plaintiffs-Appellants,* vs. JANE M. BYRNE, et al., *Defendants-Appellees.*	No. 82 C 4431

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
The Honorable **Thomas R. McMillen**, Judge Presiding.

NOTICE TO RESPOND

To: William J. Harte
111 West Washington Street
Chicago, Illinois 60602

A RESPONSE (AN ORIGINAL AND THREE COPIES WITH PROOF OF SERVICE) IS REQUIRED ON OR BEFORE June 15, 1984, TO THE "MOTION TO STRIKE PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC" filed herein on June 8, 1984, by counsel for the defendants-appellees, City Council of the City of Chicago.

Copies to:

Joaquin G. Avila
Mexican Am. Lega Def.
& Ed. Fund, Inc.
28 Geary Street
San Francisco, CA 94108

Raymond G. Romero
Mexican Am. Legal Def.
& Ed. Fund, Inc.
343 South Dearborn
Suite 910
Chicago, Illinois 60604

Barry T. McNamara
D'Ancona & Pflaum
30 North LaSalle Street
Chicago, Illinois 60602

Judson H. Miner
Davis, Miner, Barnhill
& Galland
14 West Erie Street
Chicago, Illinois 60610

Jeffrey D. Colman
Jenner & Block
One IBM Plaza
Chicago, Illinois 60611

William Bradford Reynolds
Office of Attorney General
Department of Justice
10th & Pennsylvania Ave., NW
Washington, D.C. 20530

James D. Montgomery
Office of Corporation Counsel
511 City Hall
Chicago, Illinois 60602

Jerome H. Torshen
Jerome H. Torshen, Ltd.
39 South LaSalle Street
Suite 1400
Chicago, Illinois 60603

Samuel J. Ruffolo
Baum & Ruffolo
One North LaSalle Street
Chicago, Illinois 60602

EXHIBIT "E"

(Letterhead Of)
WILLIAM J. HARTE, LTD.
Attorney at Law
111 West Washington Street-Suite 2025
Chicago, Illinois 60602

Edward R. Vrdolyak, Esq.
City Hall
Chicago, IL 60602

August 2, 1982

Re: Ketchum v. Byrne

Dear Mr. Vrdolyak:

Please accept this letter as my agreement to represent the Council in the above-mentioned cause. It is my understanding that Thomas E. Keane will be represented by the law firm of Jerome H. Torshen. The remaining defendants will be represented by the office of Earl Neal.

The arrangements for compensation for members of my firm will be as follows. My time will be compensated at $100 an hour. The compensation of my associate, Jeff Whitt, will be at a rate of $60 an hour. Expenses for the litigation, including the participation of experts, will be underwritten by the Council, but engagements of these experts will be at the approval of you or any person designated by you.

These are the arrangements essentially that I made with the Legislative Redistricting Commission of the State of Illinois in the defense of the Commission in *Rybicki v. The Legislative Redistricting Commission, et al.*, in the United States District Court for the Northern District of Illinois. Those proceedings, incidentally, have not terminated.

If you have any questions with respect to the foregoing, please advise me at your earliest convenience.

Yours very truly,
/s/ William J. Harte

WJH:ba

EXHIBIT "F"

(Letterhead Of)
WILLIAM J. HARTE, LTD.
Attorney at Law
111 West Washington Street-Suite 2025
Chicago, Illinois 60602

PERSONAL AND CONFIDENTIAL

September 10, 1982

Mr. Robert R. Retke
Assistant Corporation Counsel
511 City Hall
Chicago, IL 60602

Re: *Ketchum v. Byrne*

Dear Bob:

I would like to straighten out my compensation and agreement with respect to the above-mentioned cause. As you probably know, I have not received to date any compensation with respect to the Congressional redistricting case and the Legislative redistricting case. It has been a disaster for me economically, and I simply cannot afford to take the instant case at anything less than monthly billing.

Early on, I had a conversation with Earl Neal and he indicated, I think in your presence, that it would be best for me to be retained directly by the Council instead of going through the usual procedure of being appointed Special Assistant Corporation Counsel. I assumed this was in place and that everybody understood this procedure. In a conversation with Wilson Frost, the Chairman of the Finance Committee, and his Assistant Ed Bell, I was informed that this was not the procedure to be employed, but that I was to be appointed a Special Assistant Corporation Counsel.

I thereafter contacted Earl Neal, and he indicated that some recent legislation had been passed which authorized the Council to obtain its own counsel without the necessity of the appointment of the attorney as a Special Assistant Corporation Counsel.

Frankly, I do not perceive the magic in any specific form, but I do want to nail down something that is going to stick in such a way as to be compensated monthly. My arrangements, as I understood them, were to be that I was to be compensated at $100.00 an hour, the two associates that I have working on the case are to be compensated at $60.00 an hour, and the paralegals that I have working for me on the underlying documentation of the demographics which are critical to the case would be compensated at $30.00 an hour. If I am to have approval of expenditures before they are made or work on a budget, or be limited by amounts, I want to know that right away. We are gearing up for a major trial with major amounts of time which is to be expended. I do not expect to get any income on this case, but I insist that I will not contribute any of my own funds toward the representation of the Council. As I have informed you, my normal rate for fee-paying clients such as American Motors Corporation, Terre Haute Industries, Inc., Phonogram, Inc., or Optimum-Ideal Management Corporation is $180.00 an hour. My overhead is cast at one-half my normal billing rate. As you can see, I am essentially working for the Council for a sum which will accommodate only the overhead of my law firm.

I realize that my request for an expedited response to this letter may be inconvenient, but I respectfully request an expedited response.

Yours very truly,

/s/ William J. Harte

WJH:mjn

CC. Wilson Frost
Edward Vrdolyak

EXHIBIT "G"

(Letterhead Of)
CITY OF CHICAGO
Department of Law

August 11, 1983

William J. Harte, Esq.
111 West Washington Street
Chicago, Illinois 60602

Re: Fee Petitions in *Ketchum, et al. v. Byrne, et al.* and consolidated cases

Dear Mr. Harte:

This letter is in response to your letter to Mr. Neal of August 9, 1983, a carbon of which you directed to me.

It appears that some misunderstanding has occurred with respect to my involvement in this matter. It has never been my intention to participate in any negotiations with respect to the pending fee petitions in these cases although I have informally suggested to certain of the petitioners that their requests are, in my judgment, very high. In view of the fact that the fees are sought against the City Council and because the Council has retained its own counsel in this matter it would seem to me to be inappropriate for the Law Department to interject itself into the matter at this time. For this reason it would also seem that the involvement of Mr. Neal, who has participated in the defense of this matter as a Special Assistant Corporation Counsel may be similarly inappropriate.

Of course, if the City Council wished to retain Mr. Neal in a manner similar to that in which they have retained your own services that would be quite a different matter and I would express no opinion with respect to such an agreement.

Very truly yours,

/s/ James D. Montgomery
Acting Corporation Counsel

EXHIBIT "H"

(Letterhead Of)
WILLIAM J. HARTE, LTD.

Attorney at Law
111 West Washington Street—Suite 2025
Chicago, Illinois 60602

PERSONAL AND CONFIDENTIAL

James Montgomery, Esq. August 15, 1983
Corporation Counsel
City Hall, Chicago, IL 60602

Re: *Ketchum v. Byrne Fee Petitions*

Dear Jim:

Thank you for your letter of August 11, 1983.

I recognize that it has never been your intention to participate in any negotiations with respect to the pending fee petitions in these cases. I appreciate very much the informal suggestions that you made to the petitioners that their requests were, in your judgment, very high. That was of great assistance to me.

I accept the fact that the fees are sought against the City Council, and I accept the obligation of representing the Council in the fee petitions. I do not believe that Earl Neal would be able to participate on behalf of the City Council because, during the pre-trial and trial stages, it became apparent that Earl's clients would possibly be conflicted with members of the City Council who ultimately voted for the Plan. Actually, this is the principal reason why Earl represented the Mayor and Commissioner Murphy and I represented the Council.

I should state that although the fees are sought against the City Council, it is my understanding that a judgment ultimately would be collected from the City of Chicago, the corporate entity. You might have Bob Retke take a look at this and give me his thoughts on that subject.

Thanks again for your letter of August 11, 1983, which clarifies the situation.

Yours very truly,

WJH/mjn

/s/ William J. Harte

EXHIBIT "I"

(Letterhead Of)
CITY COUNCIL
City of Chicago

Council Chamber
Second Floor, City Hall
Telephone: 744-6800

30 May 1984

Mr. William J. Harte
William J. Harte, Ltd.
111 W. Washington St.-Suite 2025
Chicago, Il. 60602

Dear Mr. Harte:

Your letter of 23 May 1984 indicates that you are prepared to appeal the recent decision of the Seventh Circuit Court of Appeals in *Ketchum v. Byrne*. We are in substantial agreement with this decision, and therefore, do not share in your belief that an appeal is warranted.

Any attempt to reverse this decision and reinstate the map approved by Judge McMillen would be ill-advised and not in the best interest of our constituents. As members of the Chicago City Council, we instruct you to end all efforts directed toward the reversal of this decision.

We look forward to working with you as we direct ourselves toward complying with the decision of the Court of Appeals to draw a fair and equitable map that benefits all of Chicago.

Sincerely,

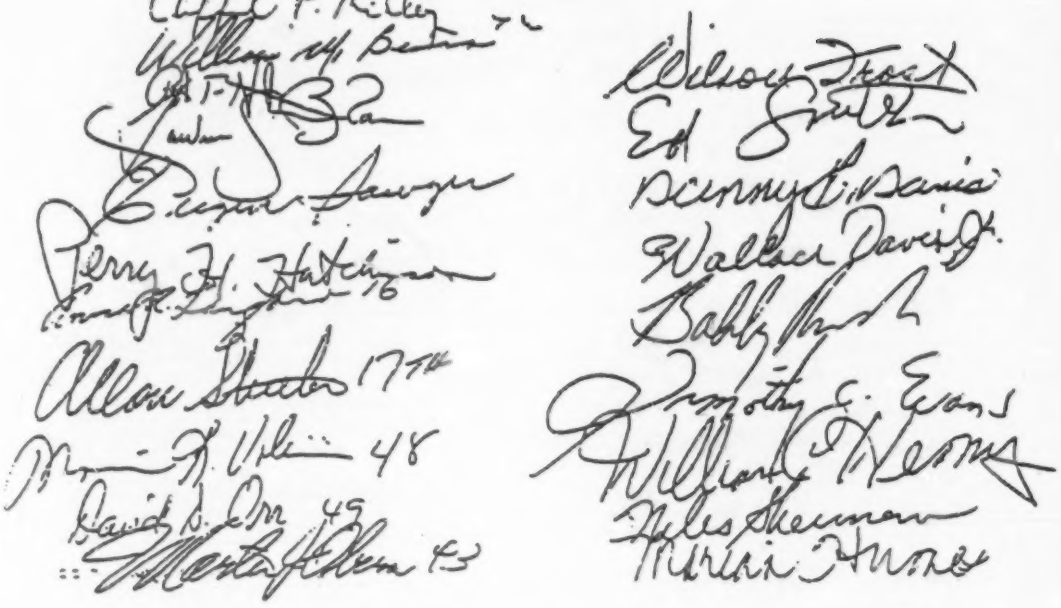


EXHIBIT "J"

(Letterhead Of)
CITY COUNCIL
City of Chicago

Council Chamber
Second Floor, City Hall
Telephone: 744-6800

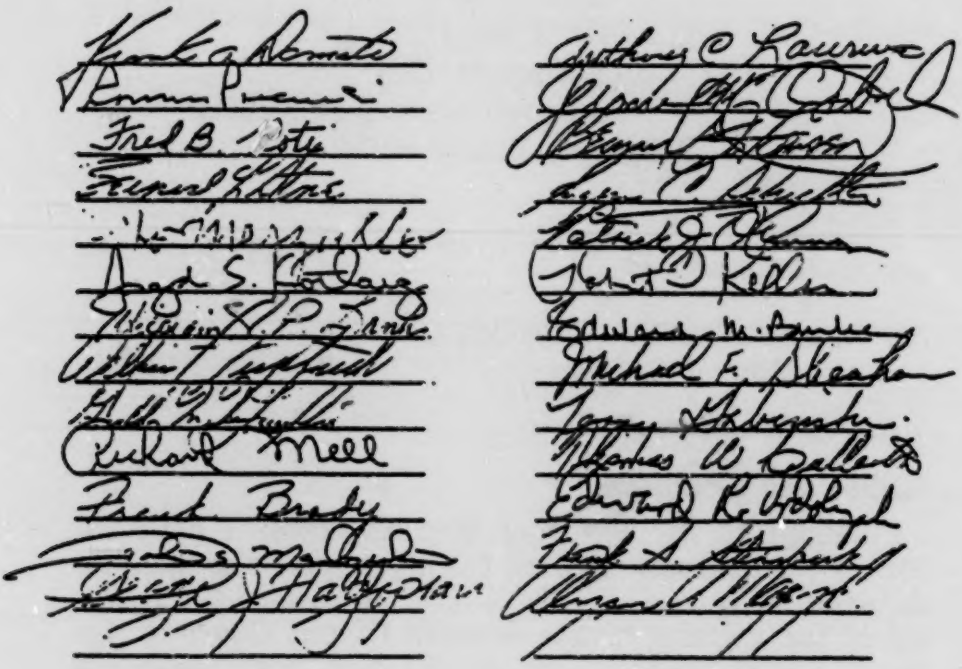
June 1, 1984

William J. Harte, Esq.
William J. Harte, Ltd.
111 West Washington Street
Suite 2025
Chicago, Illinois 60602

Dear Mr. Harte:

The undersigned members of the Chicago City Council, representing a majority of the City Council, hereby direct and authorize you immediately to take all action necessary to appeal the decision of the Seventh Circuit United States Court of Appeals in the matter of *Mars Ketchum, et. al. v. Jane M. Byrne, et. al.*, numbers 83-2044, 83-2065, and 83-2126. Your prompt attention in this matter will be greatly appreciated.

Very Truly,



EMB: CHT: pjh

EXHIBIT "K"

(Letterhead of)

WILLIAM J. HARTE, LTD.
Attorney at Law
111 West Washington Street—Suite 2025
Chicago, Illinois 60602

June 7, 1984

All Aldermen of the City Council
of the City of Chicago

Re: *Ketchum v. Byrne*

Ladies and Gentlemen:

Pursuant to my letter of May 23, 1984, I have received communications from twenty of you who have instructed me to end all efforts directed toward the reversal of the decision of the Seventh Circuit Court of Appeals. I have received written direction from twenty-six of you to exert all efforts toward the reversal of this decision. I have also received a letter from the Corporation Counsel, upon directions from the Mayor, purporting to discharge me on the eve of the last filing date for the Petition for Rehearing in the Seventh Circuit Court of Appeals, and indicating that any requested compensation for the work of my firm will be resisted.

As you know, there has been no unanimity of opinion of Council members in this litigation since its onset. Several members of the Council are named plaintiffs and are represented by independent counsel. I have attempted, as best I can, to advance the will of the Council as demonstrated by a majority of its members, while keeping all members of the Council advised as to the proceedings. At all times, individual members have had the opportunity to be represented by separate counsel.

As I view my professional responsibility, I must continue to advance the will of the Council as demonstrated by a majority of the members. Consequently, I expect to extend my efforts in seeking a reversal of this decision as requested by a majority of the members.

Yours very truly,

/s/ William J. Harte

WJH:jsr

EXHIBIT "L"

June 6, 1984

Honorable Edward M. Burke
Alderman, Ward 14
Room 302 City Hall
Chicago, Illinois 60602

Dear Alderman Burke:

The City Council of the City of Chicago has the statutory responsibility to redistrict the wards of Chicago every ten years. Such redistricting is subject to the provisions of the Voting Rights Act of 1965 which guarantees to all citizens that their rights to effectively participate in elections will not be frustrated by improper redistricting.

The November 30, 1981, ordinance redistricting the City of Chicago was challenged in the Federal Courts in a case entitled *Ketchum v. Byrne*. After the presentation of evidence United States District Judge Thomas McMillen determined that the City Council of Chicago had violated the Voting Rights Act in the redistricting of the City's wards. This finding was affirmed by the United States Court of Appeals for the Seventh Circuit which has ordered the district court to draw new ward boundaries to assure that Black and Hispanic voters are given an effective opportunity to participate in ward elections.

I endorse the decision of the Court of Appeals and believe that it is in the best interest of all the citizens of Chicago that ward boundaries are drawn in a fair and nondiscriminatory manner. The courts having spoken, it is important that the work of redistricting the City in accordance with the law begin at once. Any attempt to delay the implementation of the Court's order through an attempt at additional appellate review could only result in a delay of the implementation of the law and a useless waste of taxpayers money.

As Mayor I urge all parties to this litigation to work together to draw a legal and nondiscriminating ward map for the City of Chicago. I am directing the Corporation Counsel to take the steps necessary to end this litigation and comply with the court's mandate.

Very truly yours,

/s/ Harold Washington

Mayor

EXHIBIT "M"

(Letterhead of)

City of Chicago
COMMITTEE ON FINANCE
Room 302—City Hall

June 8, 1984

James D. Montgomery
Corporation Counsel
City of Chicago
Department of Law
City Hall, Room 511
Chicago, Illinois 60602

Dear Mr. Montgomery:

Your letter of June 6, 1984, erroneously concludes there is no legal basis preventing you, as Chicago Corporation Counsel, from representing the majority of the Chicago City Council in the appeal of *Ketchum, et al. Byrne, et al.*, numbers 83-2044, 83-2065 and 83-2126.

As you know, the Chicago City Council was sued as a defendant because it allegedly failed to discharge its statutory duties. Therefore, it is obvious that the Council majority takes the position, now, as then, that it did not breach its duties. However, Mayor Washington, whom you represent, apparently, has an opposite view. Therefore, contrary to your assertion, there is a conflict of interest of staggering proportions, which completely bars you from representing the Council majority.

I have attached for your convenience Canon 5 of the Illinois Code of Professional Responsibility, promulgated by the Illinois Supreme Court, Illinois Revised Statutes, Ch. 110A (1983), which states: "A lawyer should exercise independent professional judgment on behalf of his client."

Disciplinary Rule 5-105(b) requires an attorney to decline to represent a client if "the exercise of his professional

judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the professional employment. . . ."

Disciplinary Rule 5-105(c) permits an attorney to "represent multiple clients if it is obvious that he can *adequately represent the interest of each and if each consents to the representation* after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." (emphasis added).

The Disciplinary Rules set the " 'minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.' " Committee Comments to the Code of Professional Responsibility.

It is true the Corporation Counsel may act as an attorney for both the City Council and the Mayor, as long as there is no conflict of interest. It is clear that you agree with this proposition because your June 6 letter states that separate counsel was obtained for the City Council because of a "potential conflict" between the Mayor Jane Byrne and the Council. The mere elimination of Mrs. Byrne as a defendant is irrelevant to the issue of whether a conflict of interest exists now.

It is also beyond doubt that Mayor Harold Washington has directed you "to take steps necessary to end this litigation and comply with the (Seventh Circuit Court of Appeals) mandate." Letter of Harold Washington, June 6, 1984, enclosed in a Department of Law envelope, copies of which are attached.

Therefore, you cannot deny that you have been directed and ordered by Mayor Washington, whom you represent as a client, to pursue one course of action which completely precludes an appeal of the Seventh Circuit decision.

It is indisputable that a majority of the City Council wishes to appeal this decision. (See letter to William J. Harte, June 1, 1984, directing him to take all steps necessary to perfect an appeal, a copy of which is attached.)

A majority of the City Council will not consent to your representation of their interests in *Ketchum v. Byrne*. You cannot follow the directions of Mayor Washington and those of the Council majority at the same time and meet the minimum level of conduct set forth in the Code of Professional Responsibility with which all Illinois attorneys must comply.

Furthermore, the reported decisions in Illinois and in other jurisdictions unequivocally support the authority of the City Council, as a separate and distinct entity, to retain independent counsel when there is a conflict between the Council and the Executive, especially, when the two are diametrically opposed, as here, on the proper legal action to pursue.

Therefore, your action in discharging Mr. Harte, as counsel for the City Council majority, contrary to their wishes, was precipitious and appears to be an attempt to deprive these defendants of the counsel of their choice who will exercise independent professional judgment on their behalf. Therefore, you are hereby advised that your services as counsel in the matter of *Ketchum v. Byrne* will not be necessary on behalf of the City Council majority.

Very truly,

/s/ Edward M. Burke
Chairman
Committee on Finance

EMB:CHT:pjh
Enclosure

EXHIBIT "N"

RULE 2-110. Withdrawal from Employment

(a) **In General.**

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(b) **Mandatory Withdrawal.** A lawyer representing a client before a tribunal shall withdraw from employment (with the permission of the tribunal if such permission is required), and a lawyer representing a client in other matters shall withdraw from employment, if

(1) he knows or if it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person;

(2) he knows or if it is obvious that his continued employment will result in the violation of a disciplinary rule;

(3) his mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively; or

(4) he is discharged by his client.

(c) **Permissive Withdrawal.** If Rule 2-110(b) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because

(1) his client:

(A) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by a good-faith argument for an extension, modification, or reversal of existing law;

(B) seeks to pursue an illegal course of conduct;

(C) insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the disciplinary rules;

(D) by other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively;

(E) insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer although not prohibited under the disciplinary rules; or

(F) deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;

(2) his continued employment is likely to result in a violation of a disciplinary rule;

(3) his inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal;

(4) his mental or physical condition renders it difficult for him to carry out the employment effectively;

(5) his client knowingly and freely assents to termination of his employment; or

(6) he believes in good faith that a tribunal will, in a proceeding pending before the tribunal, find the existence of other good cause for withdrawal.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 83-2044, 83-2065, 83-2126 Consolidated

MARS KETCHUM, et al.,

Plaintiffs-Appellants,

and

CHARMAINE VELASCO, et al.,

Plaintiffs-Appellants,

and

POLITICAL ACTION CONFERENCE OF ILLINOIS, et al.,

Plaintiffs-Appellants,

and

STANLEY PILLMAN, et al.,

Plaintiffs-Intervenors,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

vs.

JANE M. BYRNE, et al.,

Defendants,

and

THE CITY COUNCIL OF THE CITY OF CHICAGO,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 82 C 4085, 82 C 4431, 82 C 4820, Consolidated.
The Honorable **Thomas R. McMillen**, Judge Presiding.

REPLY IN SUPPORT OF THE MOTION TO STRIKE PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

Now Comes the City Council of the City of Chicago, defendant-appellee, by its attorney, James D. Montgomery, Corporation Counsel of the City of Chicago, and pursuant to this Court's order of June 19, 1984, and submit the following Reply in Support of the Motion To Strike Petition for Rehearing with Suggestion For Rehearing *En Banc*.

The response filed by Mr. Harte cites several Illinois decisions regarding the power of the City Council to direct litigation and to determine whether to prosecute or abandon an appeal. While these cases state the principal in the abstract, the argument ignores the specific delegation of authority, by statute and ordinance, to the Corporation Counsel of the City of Chicago to control all aspects of litigation regarding the City of Chicago and its corporate authorities.

There can be no dispute that the provisions of Chapter 24 of the Illinois Revised Statutes designate the Corporation Counsel as the legal advisor to the City Council and specifically directs the Corporation Counsel to represent the City Council in litigation brought against it. This authority includes the authority to determine litigation strategy and to determine whether to appeal a case or abandon an appeal. *See, Newberg, Inc. v. Ill. St. Toll Highway Authority*, 98 Ill. 2d 58 (1983), where the Illinois Supreme Court upheld the authority of the Illinois Attorney General to continue litigation despite the direction of a governmental entity which he represented pursuant to a statutory obligation.

Notwithstanding this statutory power, the City Council itself has delegated, pursuant to ordinance, the authority to conduct the law business of the City to the Corporation Counsel. As a portion of this authority the Corporation Counsel has been given the discretion to certify

any judgment when he "is of the opinion that an appeal is not justified . . ." Municipal Code of Chicago, Chapter 6, §6-2. In the instant case, the Corporation Counsel has determined that further appeal is not justified.

Mr. Harte raises two points in his response which he states requires this Court to deny the Motion to Strike. First, he states that the City Council has the power to employ special counsel to represent itself in litigation. Second, he states that he has received a letter signed by 26 aldermen requesting that he file a Petition for Rehearing on behalf of the City Council. From these two arguments he concludes that the City Council has authorized the filing of the Petition for Rehearing. This conclusion is based on a false assumption.

The City Council is a collective body which acts as the corporate authority of the City Council. The City Council acts only through duly passed ordinances and resolutions. *Houston v. Village of Maywood*, 11 Ill. App. 2d 433 (1956). A statement, letter, or petition signed by a majority or all of the members of the City Council does not amount to either an ordinance or resolution. Thus while the City Council may, by ordinance, hire special counsel to represent it in litigation, Mr. Harte does not allege or represent that such an ordinance was ever adopted.

The issue, therefore, is not as Mr. Harte suggests, whether the City Council has the power to appoint counsel to prosecute an appeal but, rather, whether the City Council has exercised such power. The City Council has taken no action on this matter from the date of this Court's opinion on May 17, 1984 to the present date despite ample opportunity for the Council to have expressed its desires at City Council meetings held May 23, 1984, May 30, 1984, and June 6, 1984. Absent such formal action by the City Council, the Corporation Counsel retains his full statutory authority to represent the City Council in this case and to determine whether further appeal should be prosecuted.

Therefore, it is respectfully requested that this Court grant the Motion to Strike the Petition for Rehearing filed in this case insofar as it was filed by an attorney who is no longer authorized to represent the City Council.

Respectfully submitted,

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Attorney for the City of Chicago,
Defendant-Appellee.

[Certificate of Service omitted in printing.]